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NOTE

From: Presidency
To: Visa Working Party/Mixed Committee (EU-Iceland/Norway and
Switzerland/Liechtenstein)
Subject: The future of EU visa policy

The future of EU-visa policy

Following previous discussion in the Visa Working Party on the visa suspension mechanism and its possible revision, the Swedish Presidency wants to initiate a broader discussion on the future of EU visa policy. The ambition is to follow-up on discussions on EU visa policy held in SCIFA in February, and to prepare the discussion in the Schengen Council in March.

In order to put EU Visa Policy into a broader context, the Presidency has initiated a comparative outlook where the visa policies of selected third countries have been studied (Canada, the U.S, New Zealand and the UK). Attention has been paid in particular to the criteria for visa exemption and the suspension or termination of visa free regimes. These are described in the annex attached to this paper and may serve as a basis for further reflection.

During the past year we have seen a number of important events relating to EU visa policy. The visa suspension mechanism was activated for the first time in regard to Vanuatu. A proposal was presented on digitalisation of the visa procedure and the introduction of a digital visa. An agreement was finally reached on visa exemption for Kosovo. Moreover, the illegal Russian aggression against Ukraine led to important measures taken by the EU including the suspension of the EU-Russia Visa Facilitation Agreement as well as a decision on non-recognition of Russian passports issued in occupied territories. At the same time, the EU faced a sharp increase in irregular migration via the western Balkan route, partly relating to their non-alignment to EU visa policy. At the same time, citizens of visa-liberalised countries lodged a near-record number of asylum applications in 2022, i.e. more than twice as many as in the same period in 2021, according to statistics from EUAA.¹

Against this backdrop the Presidency believes it high time to initiate a discussion on the future of EU visa policy. How can EU visa policy be made more strategic and sustainable? How can we ensure that decisions on visa exemption are based on relevant criteria and how can we ensure that we have functional mechanisms in place if visa liberalisation is abused or results in negative consequences?

1. Asymmetry between criteria for visa exemption and suspension

Article 1 of Regulation (EU) 2018/1806 lists, in a non-exhaustive manner, the criteria on the basis of which visa exemption can be granted. It mentions illegal immigration, public policy and security, economic benefit, in particular in terms of tourism and foreign trade, and the Union's external relations with relevant third countries, including, in particular, considerations of human rights and fundamental freedoms, as well as the implications of regional coherence and reciprocity.

¹ According to EUAA, citizens benefitting from the EU visa-free regime jointly accounted for 19 900 asylum applications in November, the most on record except for the peak in March 2022, when many Ukrainians applied for asylum after the Russian invasion. As Ukrainians can register for temporary protection, their asylum applications dropped. The high number of visa-exempt applicants in November rather reflected increasing applications by Latin Americans. In contrast, fewer applications were received from citizens from western Balkan countries (including Albania, North Macedonia, Moldova as well as Bosnia and Herzegovina). See: Latest Asylum Trends | European Union Agency for Asylum (europa.eu)

Article 8(2) of the same regulation establishes the visa suspension mechanism which includes four grounds for triggering this mechanism² :

- (a) a substantial increase in refusals of entry of nationals of that third country or in overstayers;
- b) a substantial increase in the number of asylum applications from nationals of that third country for which the recognition rate is low;
- (c) a decrease in cooperation on readmission;
- (d) an increased risk or imminent threat to the public policy or internal security of Member States, in particular a substantial increase in serious criminal offences.

While the criteria for visa exemption cover several different, essentially political, areas, the grounds for temporary suspension are limited to migration and security risks directly generated by the abuse of visa exemption. It is open to debate whether such asymmetry is justified and whether the suspension of the visa exemption should remain linked only to migratory and security issues.

In the case of the latter, discussions in the Visa Working Party have resulted in a common understanding that the grounds for suspension should be clear and quantifiable. Inspiration regarding the criteria could be drawn from e.g. Canada and the US.³

It could be argued that visa free regimes should be assessed regularly on the basis of the same criteria that lead to abolishing the visa requirement in the first place.⁴ The Presidency considers it necessary to revise the visa suspension mechanism if it is to effectively contribute to ensuring continuous fulfilment of the criteria as the current asymmetry hinders such a use of the mechanism. This would require further discussions on how the criteria for visa exemption could be measured and assessed.

² The recitals of the amending regulation shed more light on what should be understood by 'substantial increase' (exceeding 50%) or 'low recognition rate' (around 3 or 4%).

³ See annex p.1.

⁴ A similar approach has been adopted in the UK and in Canada, see annex.

Decisions on visa exemption are taken under the ordinary legislative procedure, based on proposals by the Commission. The most recent proposal was presented in April 2022 regarding Kuwait and Qatar. Under EU law, there is no requirement to formally consult neither the Council nor the European Parliament before a proposal is adopted. Member States could nevertheless, without prejudice to the Commission's right of initiative, be encouraged to support the Commission in its assessment prior to a proposal being presented, including by contributing with relevant analysis, information or statistics. This could contribute to safeguarding the fulfilment of the criteria under Article 1 at an early stage, before any political commitments are made on possible visa exemptions.

2. Follow-up and suspension

a. Visa Suspension Mechanism

The visa suspension mechanism⁵ was first introduced in EU law in 2013⁶ with the main purpose of enabling temporary suspension of the visa exemption in the event of a substantial increase in irregular migration. It was subsequently revised and reinforced in 2017. In light of experiences in the past years, including the cumbersome process to suspend the visa exemption for Vanuatu and the need to be better equipped in order to respond swiftly and decisively to situations concerning irregular migration transiting through visa exempted third countries, the need for a revision of the current visa suspension mechanism is evident.

⁵ Article 8 of Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 of the European Parliament and of the Council listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification), OJ L 303, 28.11.2018, p. 39.

⁶ Regulation (EU) No 1289/2013 of the European Parliament and of the Council of 11 December 2013 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 347, 20.12.2013, p. 74–80.

Based on the discussions in the Visa Working Party on 20 January and in SCIFA on 16 February the Presidency takes note of the broad support by Member States for revising the mechanism. The mechanism could be improved by *inter alia* reviewing the thresholds and the timeframes in order to facilitate the procedure. Furthermore, the Presidency notes the support for extending the grounds for suspension by including for example alignment to EU visa policy, irregular migration including transit-hubs, citizenship by investment schemes, similar conditions for suspension due to insufficient cooperation on return and readmission as defined in article 25a of the Visa code, document security as well as political relations including human rights. The Presidency invites the Commission to take these elements into account should a proposal on the revision of the mechanism be presented.

While the visa suspension mechanism was conceived as a safeguard to preserve the integrity of the visa liberalisation processes and to ensure its credibility, mainly vis-à-vis the Western Balkan countries and Eastern Partnership countries, experience shows us that it may need to be triggered for countries far away from the European borders. As demonstrated with Vanuatu, the triggering of the mechanism for a third country exempted outside the scope of a visa liberalisation dialogue is extremely cumbersome. The high burden of proof makes it difficult both for the Commission and the Member States to meet the requirements set out in article 8. While this level of caution needs to be ensured towards privileged partners, it should not prevent the EU from acting rapidly and decisively in other circumstances. There is therefore a need to reflect on the possibility to put in place a simplified parallel procedure for third countries whose nationals have been exempted from the visa requirement outside the scope of a visa liberalisation dialogue.

Article 8, point 4 of the Visa Regulation provides for a monitoring mechanism to ensure that third countries which have been granted visa exemption following a visa liberalisation dialogue continue to fulfil the criteria which were the basis for granting visa-free status. Such monitoring mechanism does not exist for “other” visa exempted countries. While it is clear that such a thorough monitoring cannot and should not be put in place for all visa exempted countries, it is nevertheless necessary to reflect on what could be done in this respect. The experience of Vanuatu showed that although discussions within the Visa Working Party proved to be useful, a more structured dialogue between the Commission and the Member States is necessary.

b. Decisions limited in time

As the Visa Regulation stands today, decisions on visa exemptions are permanent. In cases of abuse or misuse of the visa exemption, an active decision is necessary to temporarily suspend it. To permanently terminate a visa free regime requires further legislative amendments which are adopted under ordinary legislative procedure, based on a proposal by the Commission.

This applies also in cases of serious divergence from the criteria for visa exemption as stated in Article 1 of the Visa Regulation, such as extensive violations of fundamental rights or severe divergence from European values.

As described above, measures aiming to temporarily or permanently reintroduce the visa requirement have proven to be difficult to implement in practice.⁷ Such measures are also considered highly political. In order to ensure continuous fulfilment of the criteria for visa exemption, it could be envisaged that decisions for visa exemption would be limited in time. This would allow for a regular and systematic assessment on the continuous compliance with the criteria for visa free travel to the Schengen area. Inspiration in this regard could be drawn from e.g. the US where assessments take place at least every two years.⁸ This approach would raise several questions that would need to be catered for, including the form of the legal act on the prolongation of the visa exemption as well as the consequences on third countries that have already been granted a visa exemption without time limit.

Questions

- *Do you see an added value in developing the criteria for visa exemption and make them clearer and more measurable in order to allow for effective follow-up and ensure continuous fulfilment of the criteria?*

⁷ Only two decisions have been taken on the transferring of countries from Annex II to Annex I of Regulation (EU) 2018/1806: Ecuador back in 2003 and Bolivia in 2006.

⁸ See annex.

- *Do you agree that there is a need for a monitoring mechanism for third countries granted visa exemption outside the scope of a visa liberalisation dialogue? How could such monitoring be envisaged to also provide for a more structured dialogue between the Commission and Member States for this purpose?*
 - *What is your initial view on the idea of introducing decisions on visa exemption which are limited in time, as a way to ensure continuous evaluation and fulfilment of the criteria laid down in Article 1 of the Visa Regulation?*
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*Examples from a selection of third countries***1. Criteria for visa exemption**

The visa policy in **Canada** is based on a *Visa Policy Framework* which is made up of over 40 different quantitative thresholds and qualitative criteria that determine whether a country should be considered for visa exemption. These include e.g. migration trends, social and economic factors, border control, passport integrity, temporary resident visa refusal rates and asylum claims. The criteria aim to assess drivers of irregular migration, security threats or fraud that may occur if a specific population is exempted from the visa requirement. They also aim to predict the benefits that may derive from such a decision, such as increasing people-to-people contacts and supporting new business and economic opportunities.

Similar to Canada, **New Zealand** also uses a cost/benefit model by monitoring conditions and migration trends to assess whether there is a need to change in any country's visa status due to different developments. The benefits of enhanced bilateral and international relations and enhanced people flows (e.g. tourism and business) generally outweigh the costs of factors relating to migration and security risks such as identity risks, criminality, public health or issues pertaining to the country of origin.

As for the **UK**, decisions to lift the visa requirement as well as its possible suspension take into account several factors which vary globally. The decisions all take into account a similar range of factors. They often include immigration compliance, return co-operation, national security and prosperity.

When it comes to the **U.S.**, visa free travel is operated through the Visa Waiver Program (VWP) which includes 40 countries. Countries are assessed individually against specified criteria and the potential impact of their participation in the VWP on U.S. security and law enforcement interests. A country may be designated into the VWP on the basis of the following criteria:

- a. It has an annual non-immigrant visitor visa refusal rate of less than three percent, or a lower average percentage over the previous two fiscal years;
- b. Accepts the repatriation of its citizens, former citizens, and nationals ordered removed from the U.S. within three weeks of the final order of removal;
- c. Enters into an agreement to report lost and stolen passport information to the U.S via INTERPOL or other designated means;
- d. Enters into an agreement with the U.S. to share terrorism and criminal history information, to include cooperation through the use of biometric data to assist the U.S. in routine screening to identify individuals traveling to the U.S. who represent a threat to the welfare or security of the U.S.;
- e. Issues electronic, machine-readable passports with biometric identifiers;
- f. Undergoes an evaluation of the effects of the country's VWP designation on the security, law enforcement, and immigration enforcement interests of the U.S.; and
- g. In conjunction with the evaluation mentioned above, undergoes an independent intelligence assessment.

2. Suspension or termination of the visa exemption

In **Canada**, the process to lift or re-impose a visa requirement involves the amendment of federal regulations following a recommendation from the Minister of Immigration, Refugees and Citizenship. The recommendation is based on the same criteria used to assess countries for a visa exemption (see above). In the past 10 years, Canada has re-imposed visa requirements in regards to Antigua and Barbuda (2017) as well as St. Kitts and Nevis (2014).

According to national law in **New Zealand**, the Minister of Immigration can decide to suspend a visa exemption for a period of up to three months. To date, there is a total of 11 suspensions in place. The most recent revocation of visitor visa waiver status was South Africa in 2016, primarily driven by security concerns relating to passport issuance.

In the **UK**, reasons for changes in visa regimes vary but include the same considerations and conditions taken into account when granting visa-free travel. In all cases, however, they will be made to maintain the protection and integrity of UK border security. The last example being El Salvador where, due to an increase in asylum applications, a visa regime was imposed. Moreover, national legislation provides the possibility to impose four types of visa penalties on uncooperative countries in relation to applications for entry clearance. These include longer processing times for visa applications, financial requirement (set at £190), temporary suspension on access to visas and/or treating applications as invalid. Visa penalties may be imposed where it is considered that the government of the country has taken action that present a risk to international peace and security, or whose actions lead or are likely to lead to armed conflict or a breach of humanitarian law; or in the case of returns cooperation, as a matter of last resort once all other measures have been exhausted, a country does not cooperate with the UK on the matter of returning their nationals who have no legal right to be in the UK.

The **US** Visa Waiver Program (VWP) statutorily requires reviews of the effects of each country's membership in the programme at least once every two years. If the country is found not to fulfil the requirements, it may lose its membership hence the exemption for its citizens for the visa requirement. The review process includes an assessment of the country's counterterrorism, law enforcement, immigration enforcement, passport security, and border management capabilities. The review provides a basis to determine whether to continue, suspend/terminate or otherwise adjust the program country's VWP designation. VWP designations for Argentina and Uruguay were terminated in February 2002 and March 2003, respectively. In both cases, the countries' participation in the VWP was deemed inconsistent with the U.S. interest in enforcement of the immigration laws of the U.S. National law includes additional criteria which, if met, will lead to the termination of WVP designation. These include inter alia the failure to report the loss or theft of passports, the failure to share information and the failure to screen as required.
